Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

SARAH D. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court and Appellate Court erred in dismissing Sarah Smith's action against the United States of America for lack of subject matter jurisdiction pursuant to the decision of the United States Supreme Court in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) and their interpretations of § 2680(h) of the Federal Tort Claims Act.

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CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 196 F.3d 774 (7th Cir. 1999) and is being produced at Appendix A to this Petition. The opinion of the United States District Court for the Southern District of Illinois is being produced at Appendix B to this Petition. This opinion has not been officially reported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment affirming the District Court's dismissal of the action on November 5, 1999. No Petition for Rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Subparagraph (b) of the Federal Tort Claims Act, 28 U.S.C. § 1346 et seq., provides in relevant part that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. § 2680(h) provides in relevant part that "the provisions of this Chapter and § 1346(b) of this Title shall not apply to . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights . . . "

STATEMENT OF THE CASE

A. Nature of the Case

Sarah Smith's drill sergeant (Staff Sergeant Vernell Robinson, Jr.) repeatedly raped her while she was a college student attending Advanced Individual Training ("AIT") on active military duty at the Aberdeen Proving Grounds in Maryland state. The sexual assaults occurred on locations away from the military post, when she was not receiving any benefits due to her military status and when she was not engaged in activity that was related in any way to her military duties. The negligent failure of other drill sergeants and unit officers to report or otherwise prevent Robinson's unlawful conduct caused physical, mental and emotional injuries to her and she seeks a recovery of damages for the injuries incurred.

B. Course of the Proceedings

On September 25, 1997, Sarah Smith filed a claim with the United States Army Claims Service for injuries and damages pursuant to the Federal Tort Claims Act. The agency failed to act on the claim and on May 22, 1998, she filed a civil complaint in the District Court. On

July 15, 1998, the United States of America filed a motion to dismiss her complaint, arguing that the District Court lacks jurisdiction over the suit because the Government cannot be held liable for service-related injuries to military personnel.

On August 17, 1998, Sarah Smith filed an answering brief in opposition to the United States' motion to dismiss, arguing that the district court did have jurisdiction over her lawsuit because her injuries were not service-related.

On August 28, 1998, the United States filed a reply memorandum in support of its motion to dismiss and on September 8, 1998, Sarah Smith filed a motion for leave to file a sur-reply brief, accompanied by the proposed sur-reply brief. On September 18, 1998, the United States filed a memorandum in opposition to Sarah Smith's motion for leave to file a sur-reply brief. On December 15, 1998, the district court filed a Memorandum & Order with a Judgment granting the United States' motion to dismiss Sarah Smith's complaint with prejudice.

On April 5, 1999, Sarah Smith filed an appeal with the Court of Appeals for the Seventh Circuit. The United States replied on May 6, 1999. On September 27, 1999, the Seventh Circuit heard oral arguments on Sarah Smith's appeal of the United States' Motion to Dismiss. The Court of Appeals affirmed the judgment of the District Court on November 5, 1999. Sarah Smith now petitions this Court for a writ of certiorari on this issue.

C. Statement of Facts

Sarah Smith attended Advanced Individual Training (AIT) at Aberdeen Proving Grounds, Maryland from approximately May 29, 1996 through September 4, 1996. Sarah was a sophomore in college at the time, serving in the Army Reserve with the rank of private first class ("PFC") and assigned to C Company, 16th Ordinance Battalion ("Charlie Company") where she was to receive initial training in her specialty.

Shortly after Sarah had signed into Charlie Company, approximately 8:00 p.m. on May 30, drill sergeant Vernell Robinson, Jr. ("Robinson") entered her barracks room unannounced. She was off-duty and wearing civilian clothing. Robinson forced her into his privately owned vehicle, drove her to an off-post hotel, forced her into a room and then sexually assaulted her.

On approximately June 8, Robinson pursued Sarah to an off-post hotel where she had been staying. She was again off-duty and wearing civilian clothing. SSG Robinson again forced her into his vehicle, drove her to a different off-post hotel, forced her into a room and sexually assaulted her.

On the three weekends following the June 8 incident, Robinson forced Sarah to meet him at an unidentified off-post house where he had rented a basement room. On each occasion, she was off-duty and wearing civilian clothing and, on each occasion, Robinson repeatedly sexually assaulted her.

On the July 4th holiday weekend, Robinson forced Sarah to accompany him on a trip to New York state. She

was off-duty and wearing civilian clothing throughout the entire weekend. Robinson repeatedly sexually assaulted her.

On approximately July 27, Robinson again forced Sarah to go to the aforementioned house and sexually assaulted her. She was off-duty and wearing civilian clothing. On this and every other occasion described above, Sarah was neither receiving benefits due to her status as a soldier nor engaging in activity that was related in any relevant way to her military duties.

Throughout the entire time that Sarah attended AIT, other drill sergeants and unit officers knew about Robinson's unlawful conduct toward Sarah and other female AIT trainees. These drill sergeants and unit officers were, in fact, long-time active participants in what became known as "The Game," a scheme devised by the drill sergeants and unit officers to prey on young female trainees and force them into sexual relationships. The drill sergeants and unit officers failed to report to the proper civilian or military authorities Robinson's unlawful conduct toward Sarah and they failed to take any other appropriate action to prevent his foreseeable conduct.

The Manual for Courts Martial ("MCM") provides that it is a crime for a soldier who knows of a serious offense to conceal it from civilian or military authorities if the commission of that offense would bring discredit upon the armed forces. Art. 134, ¶ 95, Manual for Courts Martial. Furthermore, at the time that Sarah was attending AIT, the U.S. Army and the Aberdeen Proving Grounds had also implemented procedures, policies and

regulations for preventing sexual harassment, discrimination and conduct between military personnel in general and between male drill instructors and female trainees in particular.[1]

The other drill sergeants' and unit officers' conduct directly and proximately caused Sarah to suffer physical injuries, severe and permanent mental anguish and emotional trauma, which has additionally resulted in her physical well-being deteriorating. She also incurred costs for medical and psychological treatment caused by their conduct.

On approximately September 25, 1997, Sarah presented her administrative claim to the United States Army Claims Service, Ft. Meade, Maryland ("Claims Service"). The Claims Service initially responded to her claim, but subsequently failed to make a final disposition.

REASONS FOR GRANTING THE PETITION

The Petitioner respectfully requests this Court to revisit the important federal question of interpreting the Federal Tort Claims Act and its exemptions. In *Feres v. United States*, 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153 (1950), this Court held that servicemen cannot recover under the FTCA for injuries that "arise out of or are in the

[1] The plaintiff was prevented from discovering the details and scope of these procedures, policies and regulations because this case was dismissed before the Government was ordered to comply with her requests for production of documents.

course of activity incident to service." However, the decision in *Feres* has received "widespread, almost universal criticism" as being wrongly decided. *In Re: "Agent Orange," Product Liability Litigation*, 580 F.Supp. 1242, 1246 (E.D.N.Y.), *appeal dism'd*, 745 F.2d 161 (2nd Cir. 1984).[2]

In applying the *Feres* doctrine to the instant facts, the lower courts have found that Sarah Smith cannot seek damages from the Government for its negligent supervision resulting in repeated sexual assaults by a commanding officer while she was part of the military. This result is not only inequitable, but it is disturbing as well. The time has come for this Court to clarify and/or modify its ruling in *Feres* so that this injustice does not continue.

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[2] *See generally*, Justice Scalia's dissent in *United States v. Johnson*, 481 U.S. 681, 692, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987); *Sanchez v. United States*, 813 F.2d 593, 595 (2nd Cir. 1987); *Bozeman v. United States*, 780 F.2d 198, 200 (2nd Cir. 1985); *Hinkie v. United States*, 715 F.2d 96, 97 (3rd Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984); *Mondelli v. United States*, 711 F.2d 567, 569 (3rd Cir. 1983), *cert. denied*, 465 U.S. 1028 (1984); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *LaBash v. United States Dept. of Army*, 668 F.2d 1153, 1156 (10th Cir.), *cert. denied*, 456 U.S. 1008 (1982); *Monoco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); *Hunt v. United States*, 204 U.S. App. D.C., 308, 317, 636 F.2d 580, 589 (D.C. Cir. 1980); *Veillette v. United States*, 615 F.2d 505, 506 (9th Cir. 1980); *Parker v. United States*, 611 F.2d 1007, 1011 (5th Cir. 1980); *Peluso v. United States*, 474 F.2d 605, 606 (3rd Cir.), *cert. denied*, 414 U.S. 879 (1973); Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U.L.J. 383 (1985); Hitch, *The Federal Tort Claims Act in Military Personnel*, 8 RUTGERS L. REV. 316 (1954); Rhodes, *The Feres Doctrine after Twenty-Five Years*, 18 A.F.L. REV. 24 (Spring 1976); Note, 51 J. AIR. L. & COM. 1987 (1986); Note, 6 CARDOZO L. REV. 391 (1984); Note, 77 MICH. L. REV. 1099 (1979); Note, 43 ST. JOHNS L. REV. 455 (1969).

A. Under Supreme Court Rule 10, this Court has the power to grant certiorari to clarify earlier holdings regarding important questions of federal law.

As a preliminary matter, Supreme Court Rule 10 provides that review on a writ of certiorari is a matter of judicial discretion. Subparagraph (c) of Supreme Court Rule 10 states that in deciding whether to grant a Petition, the Court determines whether "a state court or a United States Court of Appeals has decided an important question of Federal law that has not been, but should be, settled by this court, or has decided an important Federal question in a way that conflicts with relevant decisions of this Court." On occasion, the Supreme Court has granted certiorari to clarify its holding in an earlier case pursuant to subparagraph (c) of Supreme Court Rule 10. 23 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 510.41(3)(e) (3rd ed. 1999) *citing, e.g., Miranda v. Arizona*, 384 U.S. 436, 441-442, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) ("we granted certiorari in these cases in order further to explore some facets of the problems."); *Gertz v. Welch*, 418 U.S. 323, 325, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) ("this Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment . . . we granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen."); *Hannah v. Plumer*, 380 U.S. 460, 463, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) ("because of the threat to the goal of uniformity posed by the decision below, we grant certiorari."). Thus, it is within the jurisdiction of this Court to revisit its

holding in *Feres* and its interpretation of the Federal Tort Claims Act.

B. The *Feres* Doctrine

The Government waived much of its sovereign immunity in 1946 when Congress passed the Federal Tort Claims Act ("the Act"), rendering the Government liable:

> For money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The plain language of this provision appears to impose liability upon the United States for the negligence of Government employees even if that negligence causes injury to military personnel. *See United States v. Johnson*, 481 U.S. 681, 693, 95 L.Ed.2d 648, 107 S.Ct. 2063 (1987) (J. Scalia, dissenting). The only "military-specific" exclusion from liability that Congress specifically provided was for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* (*citing* 28 U.S.C. § 2680(j)). Shortly after the Act was passed, the Supreme Court gave effect to the plain language by rejecting the Government's argument that injured military personnel can never recover under the Act and permitting an off-duty soldier to recover damages for injuries sustained in

an accident with an Army truck. *Brooks v. United States*, 337 U.S. 49, 93 L.Ed. 1200, 69 S.Ct. 918 (1949).

One year later, however, the Supreme Court limited the Government's liability to military personnel by holding that they cannot recover under the Act for injuries that "arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146, 95 L.Ed. 152, 71 S.Ct. 153 (1950). The Court provided three rationales for its holding: (1) The parallel private liability required by the Act was absent; (2) Congress could not have intended for local tort law to govern the "distinctively federal" relationship between the Government and military personnel; and (3) Congress could not have intended to permit military personnel to recover under the Act when they could receive Veteran's benefits to compensate them for service-related injuries. *Id.* at 141-145. Several years later, the Supreme Court provided an additional rationale for barring recovery to military personnel whose injuries were service-related: Congress could not have intended to permit such claims because they "unduly interfered with military discipline." *See Johnson*, 481 U.S. at 694 (J. Scalia, dissenting) (*citing United States v. Brown*, 348 U.S. 110, 112, 99 L.Ed. 139, 75 S.Ct. 141 (1954)).

B. The *Feres* doctrine should not apply to bar Sarah Smith's claims because Robinson's repeated sexual assaults were not activities "incident to military service."

Regardless of the rationales providing support for the *Feres* doctrine, the Supreme Court has warned that the

doctrine "cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *United States v. Shearer*, 473 U.S. 52, 57, 87 L.Ed.2d 38, 105 S.Ct. 3039 (1985). The Seventh Circuit accordingly held that, with respect to military personnel bringing claims under the Act, the:

> . . . dispositive inquiry remains whether the service-member stands in the type of relationship to the military at the time of . . . her injury that the occurrences causing the injury arose out of activity incident to military service.

Jones v. United States, 112 F.3d 229, 301 (7th Cir. 1997). Lawsuits filed by military personnel who "were not taking advantage of any military program or status, but simply engaging in activities on the same grounds as civilians[,]" are generally permitted to go forward. *Id.* at 302 (*citing Brooks*, 337 U.S. at 49 (off-duty serviceman in auto accident on highway)); *Dreier v. United States*, 106 F.3d 844 (9th Cir. 1997) (off-duty soldier fell from public-access path into wastewater drainage channel on military post); *Johnson v. United States*, 704 F.2d 1431, 1436-41 (9th Cir. 1983) (off-duty soldier injured off-post due to Government's on-post negligence at NCO club); *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995) (off-duty personnel involved in off-base automobile accident); *Parker v. United States*, 611 F.2d 1007, 1015 (5th Cir. 1980) (serviceman on furlough involved in an on-base automobile accident with another serviceman); *Pierce v. United States*, 813 F.2d 349 (11th Cir. 1987) (automobile-motorcycle accident on public road)).

In the present case, Robinson first sexually assaulted Sarah Smith on approximately May 30, 1996. Staff Sergeants Wayne Gambel, Marvin Kelley and William C. Howard (some of the other drill sergeants who had been participating in "The Game") all knew about this initial sexual assault shortly after it occurred. When each subsequent sexual assault occurred, Sarah was off-duty, off post and not taking advantage of any military program or status. She was simply engaging in everyday, life-activities on the same grounds as civilians. The courts have repeatedly held that where the military person injured is not taking advantage of any military program or status, but simply engaging in activities on the same grounds as civilians, the lawsuit survives a *Feres* doctrine challenge. *Jones*, 112 F.3d at 302.

The fact that Sarah Smith was still on active military duty, despite her off-duty status, does not change the fact that each time she was sexually assaulted she was not standing in the type of relationship to the military that it can be said her injuries arose out of activity incident to her military service. These off-duty, off-post rapes (some taking place in different states during a holiday weekend) cannot be characterized as "incident to military service." It could just as easily have been a civilian woman in Sarah's place and, if it had, the *Feres* doctrine would not even have been raised by the Government.

This case is distinguished from *Jones*, where the Army had assigned the military plaintiff to the San Francisco/Oakland area so that he could participate in trials for the 1992 United States Military Olympic team. While in the area, Jones was admitted to the Oakland Naval Hospital to undergo surgery to relieve chronic abdominal

pain. The procedure injured his legs and he filed a claim under the Act to recover damages. This Court affirmed the district court's motion to dismiss, ruling that the plaintiff was acting subject to military jurisdiction because the Army had assigned him to the area, he was there to take advantage of a military perquisite and he was injured at a military hospital. By way of contrast, in the present case, during each of the assaults subsequent to the initial sexual assault, Sarah was not assigned to the locations where she was raped, she was not taking advantage of any military prerequisite and she was not injured at a military installation.

C. Assuming, for the sake of argument, that Sarah Smith's injuries are determined to be service-related, the purported rationales of the *Feres* doctrine do not apply in this case.

To the extent that this Court may find that Sarah Smith's injuries were, in fact, service-related, she urges this Court to disregard the three surviving rationales for the *Feres* doctrine as ill-conceived, unsupported by the Act or its legislative history, and inapplicable here. *See Johnson*, 481 U.S. at 692-703 (J. Scalia, dissenting) (providing an excellent historical analysis of the *Feres* doctrine and urging courts to apply the Act as written). The first rationale offered by the *Feres* Court – and the only one that is arguably textually based[3] – has already been abandoned by the Supreme Court. *See Rayonier, Inc. v. United*

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[3] *See Johnson*, 481 U.S. at 694 (criticizing the parallel liability rationale) (J. Scalia, dissenting).

States, 352 U.S. 315, 319 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955).

The Supreme Court has similarly dismissed the second *Feres* rationale – the military need for uniformity in governing the "distinctively federal" relationship – as "no longer controlling." *Shearer*, 473 U.S. at 58 n. 4. The text of the Act positively contradicts this approximation of congressional intent. See 28 U.S.C. §§ 2680(b), 2680(i), 2680(k) (demonstrating that Congress considered the uniformity problem, yet chose to retain sovereign immunity for only some military claims, e.g., 28 U.S.C. § 2680(j)). This justification has furthermore effectively been abandoned by permitting military personnel to recover under the Act for non-service-related injuries and permitting civilians to recover for injuries caused by military negligence. *Johnson*, 481 U.S. at 696 (J. Scalia, dissenting) (*citing Indian Towing*, 350 U.S. 61). In addition, Justice Scalia has explained that the:

> . . . unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform recovery cannot possibly be worse than (what Feres provides) uniform nonrecovery.

Johnson, 481 U.S. 681 (J. Scalia, dissenting).

The Supreme Court has likewise dismissed the third *Feres* rationale as "no longer controlling." *Shearer*, 473 U.S. at 58 n. 4. Both before and after the *Feres* case, the Supreme Court permitted injured military personnel to bring claims under the Act even though they had already been compensated under the Veterans' Benefits Act, 38 U.S.C. § 301 *et seq.* ("the VBA"). *See also*, Note, *From Feres*

to Stencel: Should Military Personnel Have Access to FTCA Recovery?, 77 MICH. L. REV. 1099, 1106-1108 (1979).

Finally, the fourth rationale – the "military discipline" argument – relies upon the highly speculative concerns that permitting military personnel to sue the Government for the negligence of other Government employees will undermine military discipline and require civilian courts to second-guess military decision-making. *See Johnson*, 481 U.S. at 699 (J. Scalia, dissenting). *See also*, Bennett, *The Feres Doctrine, Discipline and the Weapons of War*, 29 ST. LOUIS U.L.J. 383, 407-11 (1985). With respect to the military discipline issue, the more likely result here is that the morale of Sarah Smith's fellow soldiers (especially her female comrades-in-arms) will most likely be harmed when they learn that the Government will *not* compensate her for her injuries, but would have if she had only been a civilian.

Moreover, with regards to the issue of civilian courts second-guessing military decision-making, the plain truth is that this occurs every day. Civilians sue and recover from the Government for its negligence on a daily basis, repeatedly "invading the sanctity of military decision-making." *See Johnson*, 481 U.S. at 699 (J. Scalia, dissenting). To allow Sarah Smith to pursue her claim against the Government will not interfere with decisions made in the military. On the contrary, in allowing this suit to go forward, the military will be and should be forced to reevaluate its supervisory procedures it uses to protect its servicemen and women.

Ultimately, Sarah's injuries had absolutely nothing to do with her military service. Soldiers injured on field

exercises, training missions and in combat suffer injuries arising from their military service. Soldiers raped by their drill instructors suffer injuries arising from the risks facing all women who cross the path of a group of predators. Sarah is not attempting to haul commanding officers into court to answer for their military and disciplinary decisions. *See Shearer*, 473 U.S. at 58. She is not calling into question official military duties with respect to the pattern of training, weaponry and orders. *See Stephenson v. United States*, 21 F.3d 159, 163-64 (7th Cir. 1994). She is not questioning the wisdom of a commanding officer's military orders, given to further some military goal. She is questioning the audacity of a group of sexual predators, masquerading as drill instructors, who failed to do the right thing and prevent further sexual attacks against her. She is simply seeking to hold the Government accountable for the breach of its affirmative duty to safeguard her from sexual assaults by her drill sergeant.

The military has implemented criminal provisions, as well as policies, procedures and regulations designed to prevent just the sort of injuries Sarah has incurred here. The Government should not now be permitted to use these provisions as a shield from its own liability, especially when the provisions were designed to protect the very people from whom the Government now seeks protection.

Sarah Smith asks this Court to revisit its holding in *Feres* due to the inequitable treatment she and others have received thus far. By the lower courts applying *Feres* to Sarah's case, she is left without any redress against those military officials who knew or should have known about the repeated attacks from which she was suffering. The

reason why these attacks happened in the first place stems from a fundamental tenet of the culture: follow the orders of those in command. Sarah Smith, believing in her role as a servicewoman, took this very seriously. Tragically, in Sarah's case, those in command failed miserably in protecting her from these attacks.

D. Sarah Smith's claim that other drill sergeants and unit officers negligently allowed her drill sergeant's foreseeable sexual assaults against her to occur is not excluded by § 2680(h) of the Federal Tort Claims Act.

The Supreme Court has clearly held that the negligence of other Government employees, who allow a foreseeable assault and battery to occur, may furnish a basis for Government liability that is entirely independent of the assaulting employee's status as a Government employee. *Sheridan v. United States*, 487 U.S. 392, 401, 101 L.Ed.2d 352, 108 S.Ct. 2449 (1988) (construing § 2680(h) of the Act)). The *Sheridan* Court explained that the Government may be liable for a plaintiff's gun shot injuries under the following circumstances: (1) The Government had voluntarily adopted a regulation prohibiting the possession of firearms on a naval base and requiring all base personnel to report the presence of firearms on the base; and (2) After learning that an intoxicated person was on the base with a firearm, certain military personnel failed to report that individual to the proper military authorities. *Id.*

In *Sheridan*, the plaintiffs filed suit under the Act against the United States for personal injuries and

property damage. The plaintiffs alleged that their injuries were caused by the Government's negligence in allowing a Government employee ("Carr") to leave a navy hospital with a loaded rifle in his possession. Three naval corpsmen found Carr in a drunken stupor in a hospital building and they attempted to take him to the emergency room but fled when they saw that he had a rifle. They took no further action to subdue Carr and failed to report the incident to the proper authorities. Later that evening he fired shots into the plaintiff's automobile as they were driving on a public street near the naval base. *Id.* at 395.

The *Sheridan* Court cautioned that:

> . . . if nothing more was involved here than the conduct of Carr at the time he shot at petitioners, there would be no basis for imposing liability on the Government. The tortious conduct of an off-duty serviceman, not acting within the scope of his office or employment, does not in itself give rise to Government liability whether that conduct is intentional or merely negligent.

Id. at 401. The Supreme Court observed, however, that the negligence of the three other corpsmen who allowed the foreseeable assault and battery to occur furnished a basis for the Government's liability that was entirely independent of Carr's employment status with the Government. *Id. Sheridan* accordingly held that:

> By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly

> armed, the Government assumed responsibility to "perform [its] 'good samaritan' task in a careful manner."

Id. The Supreme Court reversed the District Court's order dismissing the action and remanded for further proceedings to determine whether the complaint stated a claim under Maryland law. *Id.* at 401-03.

In the present case, similar to *Sheridan*, Sarah Smith alleges that the Government assumed a responsibility to carefully perform its "Good Samaritan" task because of the following circumstances: (1) The Army promulgated criminal and civil provisions designed to prevent sexual harassment and conduct toward female trainees and, further, required reporting such infractions to the proper authorities; and (2) The drill sergeants and unit officers who were actively participating in "The Game" subsequently failed to report Robinson's known unlawful conduct to the proper civilian or military authorities and failed to take any other appropriate action to prevent his foreseeable conduct. Sarah's injuries were caused by the Government's negligence in allowing Robinson to continue assaulting her over an extended period of time.[4] The other drill sergeants and unit officers knew about

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[4] Sarah Smith argued in the District Court that it is the negligence of the other drill sergeants and unit officers (who allowed the subsequent foreseeable assaults to occur) that furnishes a basis for the Government's liability here. That liability is entirely independent of Robinson's employment status and, accordingly, the Government's argument that Sarah has failed to state a claim, because Robinson was not acting within the scope of his employment, is misplaced.

Robinson's wrongful conduct[5] and they concealed it, failing to report it to the proper authorities. Robinson subsequently assaulted Sarah on several more occasions.

Similar to *Sheridan*, if nothing more was involved here than the conduct of Robinson at the time he sexually assaulted Sarah Smith, there would be no basis for imposing liability on the Government. His tortious conduct, arguably not committed while acting within the scope of his employment, does not in itself give rise to Government liability. The negligence, however, of the other non-commissioned officers who allowed the subsequent foreseeable assaults to occur does furnish a basis for the Government's liability that is entirely independent of Robinson's employment status. By voluntarily adopting criminal and civil provisions that prohibit soldiers from concealing the commission of known serious offenses that would bring discredit upon the armed forces and, further, that prohibit sexual harassment, discrimination and conduct toward female trainees; then, by voluntarily undertaking to conceal Robinson's serious offenses and failing to report it to the proper authorities, the Government initially assumed responsibility to perform its "Good Samaritan" task in a careful manner and subsequently breached that duty.

The United States takes pride in its military system, as well it should. We send our sons and daughters off to the military to help defend our nation. Sarah Smith

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[5] Article 134, para. 95 of the Manual of Courts Martial provides that a "serious offense" is "any offense punishable under the authority of the code by . . . confinement for a term exceeding 1 year."

arrived at Aberdeen Proving Grounds in May of 1996 proudly ready to serve her country, not the prurient interests of a group of sexual predators. What happened to her was unforgivable and unforgettable. Unfortunately, simply because Sarah was attacked during the time that she was on active duty, the courts below have applied *Feres* and barred her from recovery for her injuries. Surely this cannot be the result that this Court contemplated when interpreting the FTCA in *Feres*. Moreover, the other drill sergeants and unit officers participating in "The Game" had knowledge of this foreseeable harm to Sarah, which supports Sarah's claim that this negligence allowed these brutal attacks to occur.

CONCLUSION

The time has come for this Honorable Court to explain that young servicewomen who have been raped by their drill instructors have not suffered injuries arising from their military service. Furthermore, we ask this Court to clarify that, when other military officials know of these attacks and the reasonable likelihood that they will continue, the military has then assumed the responsibility to prevent those injuries and, importantly, those injuries do not arise from an assault or battery. For these reasons, Sarah Smith respectfully requests this Court to grant her Petition for Writ of Certiorari.

Respectfully Submitted,

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APPENDIX A

In the

United States Court of Appeals

for the Seventh Circuit

No. 99-1397

SARAH D. SMITH,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 98-C-408 – William D. Stiehl, *Judge.*

ARGUED SEPTEMBER 27, 1999 – DECIDED NOVEMBER 5, 1999

BEFORE POSNER, *Chief Judge,* and RIPPLE and ROVNER, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Sarah D. Smith brought this action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.* Ms. Smith claimed that, while she was serving as a private first class in the United States Army, the Government negligently supervised her drill sergeant, who committed a series of sexual assaults against her. She also claimed that other officers failed to protect her from that drill sergeant. The district court held that it was foreclosed from adjudicating the case by the Supreme Court's decisions in *Feres v. United States,*

340 U.S. 135 (1950), and *Shearer v. United States*, 473 U.S. 52 (1985). For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

Sarah Smith attended Advanced Individual Training at Aberdeen Proving Ground in Maryland from May 29, 1996, to September 4, 1996.[1] While at Aberdeen, she was on active duty in the United States Army and held the rank of private first class. Staff Sergeant Vernell Robinson, Jr. was the drill sergeant assigned to her platoon. Ms. Smith alleged that while she was off-duty and in civilian clothing Robinson entered her barracks room unannounced. According to her allegations, Robinson then forced her into his privately-owned vehicle, drove her to an off-post hotel, and then forced her to have non-consensual intercourse. Ms. Smith further alleged that, on another occasion, Robinson pursued her to an off-post hotel, forced her once again into his vehicle, took her to a different off-post hotel, and again forced her to engage in non-consensual intercourse and sodomy. According to the

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[1] The facts here are taken from Ms. Smith's complaint. In a motion to dismiss for lack of subject matter jurisdiction, all well-pleaded factual allegations in the complaint are taken as true. *See Komorowski v. Townline Mini-Mart & Restaurant*, 162 F.3d 962, 964 (7th Cir. 1998) (per curiam). A district court's dismissal under *Feres* is treated as a dismissal for lack of subject matter jurisdiction. *See Selbe v. United States*, 130 F.3d 1265, 1266 (7th Cir. 1997); *Jones v. United States*, 112 F.3d 299, 301 (7th Cir.), *cert. denied*, 118 S.Ct. 173 (1997).

allegations of the complaint, throughout June, the sergeant repeatedly forced Smith to an off-post house, where he had rented a room. On the July 4 holiday weekend, the allegations continued, Robinson forced Ms. Smith to accompany him to New York State; on July 27, he once again forced her to the off-post house. On all of these occasions he forced Ms. Smith to submit to non-consensual intercourse. On all of these occasions Ms. Smith was off duty.

Ms. Smith alleged further that other officers at Aberdeen, both commissioned and non-commissioned, had knowledge of Robinson's activities but did nothing to stop him. She claimed that Robinson committed similar acts with other female trainees and that none of the officers who were aware of his acts ever reported them.

Ms. Smith first presented her claim to the United States Army Claim Service, but never received a final disposition. She then brought this action against the United States under the FTCA, seeking damages for the misconduct of Robinson and the other officers. The Government moved to dismiss, arguing that jurisdiction was foreclosed by *Feres*. In *Feres*, the Supreme Court held that the FTCA does not create liability for "injuries aris[ing] out of or . . . in the course of activity incident to [military] service." 340 U.S. at 146. The Government further argued that Smith's claim arose out of assault and battery; such claims are excepted from the FTCA. *See* 28 U.S.C. § 2680(h). In addition, the Government argued that Ms. Smith had failed to state a claim under state tort law, a necessary prerequisite for recovery under the FTCA. The district court agreed with the Government that *Feres* precluded its consideration of the case.

II

DISCUSSION

In *Jones v. United States*, 112 F.3d 299 (7th Cir. 1997), Judge Flaum, writing for this court, summarized succinctly the so-called "*Feres* doctrine" and set forth the three rationales that have been articulated to support it:

> In *Feres v. United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950), the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The Court reaffirmed *Feres* in *United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987), where it explained three broad rationales that support *Feres:* (1) the need to protect the distinctively federal relationship between the government and the armed forces, which could be adversely affected by applying differing tort laws; (2) the existence of statutory compensatory schemes; and (3) the need to avoid interference with military discipline and effectiveness. *Johnson*, 107 S. Ct. at 2067-68.

Jones, 112 F.3d at 301. Quoting the Supreme Court's decision in *United States v. Shearer*, 473 U.S. 52 (1985), the Judge also noted that " '[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases.' " *Jones*, 112 F.3d at 301 (quoting *Shearer*, 473 U.S. at 57). "The dispositive inquiry remains whether the service-member stand[s] in the type of relationship to the military at the time of his or her injury that the occurrences causing the injury arose out of

activity incident to military service." *Stephenson v. Stone*, 21 F.3d 159, 162 (7th Cir. 1994). In answering this crucial question in this case, we believe that the Supreme Court's decision in *Shearer* and this court's decision in *Stephenson* provide significant guidance in determining whether, on the facts as alleged in the complaint, Ms. Smith's injury from the failure of the Government to supervise properly Sergeant Robinson can be characterized as "activity incident to military service."

In *Shearer*, the mother of Vernon Shearer sought damages from the United States after her son was murdered by another serviceman, Andrew Heard, while off duty and away from his base. *See Shearer*, 473 U.S. at 53. She claimed that the Army had failed to control Heard, and had not warned others that he was dangerous. *See id.* at 54. The Supreme Court determined that the allegation that the Army had failed to control Heard placed into direct question the manner in which the Army supervised its personnel, and therefore presented the kind of inquiry into the Armed Forces' management of disciplinary matters that *Feres* places beyond the scope of the FTCA. *See id.* at 58.

This court was faced with a similar situation in *Stephenson*. There, Specialist Stephenson was murdered by another service member against whom he was scheduled to testify in a court-martial. *See Stephenson*, 21 F.3d at 161. The family of the murdered service member alleged that the Army had been negligent in failing to isolate effectively the accused service member from the witness in the time before trial. *See id.* The family also alleged that the Army had not taken proper precautions with respect to

the storage of the personal weapons of the accused service member. *See id.* Relying on *Shearer,* we held that the most important factor is not the situs of the crime but whether adjudication of the allegations of the complaint require that the court pass judgment on the Armed Forces' decisions about fundamental issues regarding the supervision, control, and discipline of servicemen. *See id.* at 162-63.

The allegations that the Army failed to control Staff Sergeant Robinson implicate important questions about the management of military personnel by those charged with that high responsibility. The wrongs allegedly perpetrated by Staff Sergeant Robinson upon then-Private First Class Smith were made possible by his status as her military superior. *Cf. Mackey v. Milam,* 154 F.3d 648, 651 (6th Cir. 1998) (holding that officers were acting within the scope of their employment when they harassed a captain, because they had supervisory power over her granted by their mutual employer, the Air Force), *cert. denied,* 119 S. Ct. 2393 (1999). Similarly, the claims that other officers failed to report Robinson's conduct implicate serious questions about the proper conduct and readiness of military units. As we have noted earlier, *Shearer* tells us that the military nature of the relationship between the alleged tortfeasor and his victims is critical, even if the specific incidents occurred off base or while one or both parties were off duty. Here, the complaint clearly alleges that those superior to Staff Sergeant Robinson in the chain of command failed to prevent his abusing

his military authority over Ms. Smith. This sort of allegation certainly is controlled by *Feres*.[2]

Lest we be misunderstood, we emphasize that our holding today that the present suit is barred by the *Feres* doctrine in no way suggests that we minimize the seriousness of the alleged misconduct. As the opinions of the Supreme Court and of this court make clear, employer tolerance of sexual assault and sexual harassment in the workplace is a serious matter. Sexual assault and sexual harassment is always demeaning and often permanently scars the victim. Furthermore, it renders the workplace less productive and stifles the initiative and creative capacity of the organization. When the organizations involved are the Armed Forces of the United States, the victim, in addition to the suffering experienced by all such victims, is deprived of the very special satisfaction that military service to the Country should bring. Tolerance of such behavior also results in a warping of military discipline, a lack of military readiness, and a weakening of national security. Democratic support for military institutions is eroded when citizens do not believe that their children, and those of their neighbors, will be treated with dignity and respect during their period of service.

We hold only that Congress has made it clear that an FTCA action, in which the service member seeks damages from the United States and necessarily calls into question the management decisions of those who exercise military

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[2] Because we find that we do not have jurisdiction under *Feres*, we need not reach the other issues presented in this case. *See Rogers v. United States*, 902 F.2d 1268, 1275 (7th Cir. 1990); *Lewis v. United States*, 663 F.2d 889, 892 (9th Cir. 1981).

leadership, is not the appropriate avenue for a wronged service member seeking redress for such a grave wrong. Congress has chosen instead to discipline the perpetrator through the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*, and to care for the victim through the programs established within the Armed Forces and the Veterans Administration. In doing so, Congress has also made a decision that such programs are adequate to serve as a deterrent against similar lapses in the future and to assist the victim in recovery. It is not our role, at least in the context of an FTCA suit, to pass judgment on the adequacy of that Congressional response.

Conclusion

Accordingly, the judgment of the district court is affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

SARAH SMITH, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	))))))))	Cause No. 98-CV-408-WDS

MEMORANDUM & ORDER

(Filed Dec. 15, 1998)

STIEHL, District Judge:

Before the Court is the government's motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim pursuant to **Fed. R. Civ. P. 12(b)(1)** and **(6)**, to which plaintiff has filed a response, and the government has filed its reply.

BACKGROUND

After her sophomore year of college, plaintiff attended Advanced Individual Training (AIT) at Aberdeen Proving Ground, Maryland, from May 29, 1996 to September 4, 1996. Plaintiff was an army private first class and was assigned to C Company, 16th Ordnance [sic] Battalion, commonly known as Charlie Company.

According to the complaint, on May 30, 1996, Staff Sergeant Vernell Robinson, Jr., the drill sergeant assigned to plaintiff's platoon, entered her barracks unannounced

at 8:00 P.M. Plaintiff alleges she was off-duty and wearing civilian clothing, and that Robinson allegedly forced her into his privately owned vehicle and drove her to an off-post motel. At the hotel, plaintiff alleges that Robinson forced her into a room and forced her to engage in nonconsensual sexual intercourse and sodomy with him.

Plaintiff alleges that several similar incidents occurred during her three months of AIT, including a nonconsensual trip to New York state where plaintiff engaged in nonconsensual sexual relations with Robinson. In all of these incidents, plaintiff alleges that she was off-duty, wearing civilian clothes, driven to an off-post location, and forced to perform various sexual acts with Robinson. Moreover, plaintiff alleges that other commissioned and non-commissioned officers were aware of Robinson's alleged predatory behavior toward plaintiff and other female AIT trainees.

Plaintiff asserts that the government should be held liable for its negligent supervision of Robinson, which resulted in assault, battery, and intentional infliction of emotional distress. The parties agree that if plaintiff's allegations are true, she has sufficiently alleged assault and battery under Maryland law. Plaintiff contends that the officers who knew of Robinson's unlawful conduct and failed to protect her acted within their scope of employment. By not protecting her, according to plaintiff, the officers violated military law and Maryland's Good Samaritan Law.

The government asserts that the Court lacks subject-matter jurisdiction and that plaintiff has failed to state a claim upon which relief may be granted. The government

presents two arguments that the Court lacks subject-matter jurisdiction under the Federal Tort Claims Act (FTCA). First, the government contends that Robinson's behavior arose out of or was within the course of activities incident to military service. ***Feres v. United States*, 340 U.S. 135, 146 (1950)**. Such military activities are not reviewed by the judiciary pursuant to the doctrine established in ***Feres. Id.*** Second, the government argues that the FTCA bars this suit because it expressly excludes any claim arising out of assault and battery. **28 U.S.C. § 2680(h).**

In the alternative, the government asserts that the complaint is subject to dismissal because plaintiff failed to state a claim upon which relief may be granted. First, the government contends that Robinson did not act within his scope of employment. Second, the government asserts that the officers who failed to report Robinson's conduct did not have a "special relationship" with plaintiff. Absent a special relationship, the officers did not have a duty to protect under Maryland law. ***Lamb v. Hopkins*, 492 F.2d 1297, 1302 (Md. 1985).**

ANALYSIS

Until Congress enacted the FTCA in 1946, the federal government could not be sued in tort. **Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. Rev. 871, 875 (1991).** Under the FTCA, district courts possess exclusive jurisdiction over claims filed against the government for property damages, personal injury, or death arising from the negligence of federal employees acting

within the scope of their employment. **28 U.S.C. § 1346(b)(1).** Thus, the FTCA serves as a broad waiver of federal sovereign immunity. ***Kosak v. United States*, 465 U.S. 848, 852 (1984).** However, FTCA's waiver of sovereign immunity is not absolute. **28 U.S.C. § 2680; *Feres*, 340 U.S. at 146.** In this case, the government asserts that two exceptions to the waiver rule are applicable. First, the government argues that plaintiff's claim is barred because her alleged injuries were service-related. ***Ferres*, 340 U.S. at 146.** Second, the government argues that plaintiff's claim is barred because her alleged injuries arise out of an alleged assault and battery. **28 U.S.C. § 2680(h).** Because the issue is whether the Court has jurisdiction over the claim, the burden of proof is on plaintiff to prove subject matter jurisdiction exists. ***Aragon v. United States*, 146 F.3d 819, 812 (10th Cir. 1998).**

1. The *Feres* Doctrine

In *Feres*, the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in course of activity incident to service." **340 U.S. at 146.** In *Feres*, the widow of Lieutenant Feres alleged negligence in that his superiors quartered him in barracks that burned due to a defective heating system. ***Id.* at 136.** The Supreme Court held that the claimant could not recover under the FTCA because Congress did not intend for service members to sue the government for negligence when their injuries occurred "while on active duty and not on furlough." ***Feres*, 340 U.S. at 138; *Stephenson***

v. Stone, 21 F.3d 159, 162 (7th Cir. 1994). The *Feres* decision rested on three broad rationales: 1) the FTCA's goal of "parallel liability" in similar circumstances occurring in the private sector would be thwarted because private individuals do not raise and maintain armies; 2) Congress intended Veterans Administration benefits and other statutory schemes to be the exclusive remedies for similar injuries; and 3) it would be unfair to subject service members to varying state laws when they have no control over where they are stationed. *Id.* at 141-145; 28 U.S.C. § 2674. Four years later, the Supreme Court added an additional rationale which recognized the importance of avoiding judicial interference with the military's effectiveness and discipline. *United States v. Brown*, 348 U.S 110, 111-13 (1954).

In *United States v. Shearer*, the Supreme Court held that military discipline and effectiveness are the primary considerations when determining government liability under *Feres*. 473 U.S. 52, 57-59 (1985). In *Shearer*, a serviceman murdered an Army private who was off base in another state and on leave. *Id.* at 53. The claimant alleged the Army was negligent in that it failed to reasonably control the murderer, a man who had committed a prior murder. *Id.* at 53-54. The Supreme Court denied the claimant any recovery, holding that the primary determination is "whether the suit requires the civilian court to second-guess military decision, and whether the suit might impair essential military discipline." *Id.* at 57 (citations omitted). The Supreme Court deemed the situs of the murder and the serviceman's status "not nearly as important" as the military's ability to function effectively. *Id.* at 58-59. Thus, the Court held that the *Feres* doctrine

may preclude recovery even when the incident occurs off base had the soldier is on leave. ***Id.* at 59.**[1]

The ***Feres*** doctrine is not subject to any bright-line rules, each case is entitled to an independent examination. ***Stephenson*, 21 F.3d at 162, *citing Shearer*, 473 U.S. at 57.** The Seventh Circuit, however, has "consistently found that a service-member's injury is incident to military service whenever the injury is incurred while the

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[1] Two years later, the Supreme Court applied the other ***Feres*** factors in ***United States v. Johnson*, 481 U.S 681 (1987).** In Johnson, a Coast Guard pilot died when an FAA controller allegedly gave improper directions, placing the helicopter on a collision course with the side of a mountain. ***Id.* at 682-83.** The claimant filed suit against the government, alleging the civilian FAA air traffic controller negligently cause her husbands's death. ***Id.* at 683.** In dismissing claimant's suit, the Supreme Court first discussed the distinctively federal relationship between servicemen and the government. ***Id.* at 688-89.** Because service in the military entails travel around the world, "it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." ***Id.* at 689, *quoting Sencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 672 (1977).** Next, the *Johnson* Court reiterated the exclusivity of the government's generous statutory disability and death benefits. ***Id.* at 689-90.** The Supreme Court stated that servicemen already possess a remedy to recover for service-related injuries and if Congress wanted to amend the FTCA to include injuries sustained during service-related activities, it would have done so. ***Id.* at 690.** Finally, the Supreme Court held that the judiciary should not interfere with the operation of the military. ***Id.* at 690-91.** "Suits brought by service members against the Government could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." ***Id.* at 691.**

individual is on active duty or subject to military discipline." ***Collins v. United States*, 642 F.2d 217, 219 (7th Cir.), *cert. denied*, 452 U.S. 964, 101 S.Ct. 3115 (1981)**; ***see also Chappell v. Wallace*, 462 U.S. 296, 299, 103 S.Ct. 2362, 2365 (1983)** (Congress did not intend government to be subject to suits for injuries suffered in service by members of Armed Forces); ***M.M.H. v. United States*, 966 F.2d 285, 288-89 (7th Cir. 1992)** (Army's post-discharge negligence actionable only if the negligent act constituted a new and independent tort after service-member was discharged from active duty); ***Duffy v. United States*, 966 F.3d 307, 312 (7th Cir. 1992)** (reservist's claim that he was illegally called into active duty barred by *Feres* because the reservist military status was the *sine qua non* for the call to active duty); ***compare Brown*, 348 U.S. at 11-13** (permitting action when injury occurred subsequent to discharge).

In *Stephenson*, an active-duty member of the Army was shot by a superior officer who engaged in an homosexual act with him. *Stephenson*, **21 F.3d at 161.** Stephenson reported the sodomy to the proper military authority and the court martial proceedings were initiated. *Id.* Thereafter, the government allegedly committed two negligent acts. *Id.* First, the superior officer was not successfully isolated from Stephenson despite the fact that the superior officer was diagnosed as suicidal and had threatened Stephenson's life. *Id.* Second, army personnel did not properly inspect the superior officer's personal weapons case and, as a result, failed to discover that a .44 caliber pistol was missing. *Id.* The superior officer shot and killed Stephenson with the missing pistol. *Id.*

In ruling that Stephenson's murder was incident to service, the Seventh Circuit stressed the rationale behind the Supreme Court's holding in *Shearer* – the civilian judiciary should not meddle in military issues of discipline, supervision, and control of servicemen. ***Stephenson*, 21 F.3d at 163-64**, *citing Shearer*, **473 U.S. at 57-59.** Consonant with *Shearer*, the Seventh Circuit rejected claimant's argument that explicit violations of command decisions, orders, and regulations can provide a basis for a specific negligence claim without questioning the propriety of the rules themselves. ***Stephenson*, 21 F.3d at 163.** The court recognized that to determine whether the Army was negligent, the judiciary would necessarily "become involved in sensitive military policies" because the Army's response to the allegations of homosexual conduct is a policy issue. *Id.* **at 164.** In *Stephenson*, the court addressed the concerns raised by the relationship between soldiers and their superior officers. The court recognized that this relationship is central to the manner in which the military deals with disciplinary and supervisory affairs; therefore, entertaining the case would enable the judiciary to question the issuance and execution of military orders. *Id.* **at 163-64.** Finally, the Seventh Circuit noted the general rule that "[C]ourts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." *Chappel*, **462 U.S. at 305,** *quoting* **Warren,** ***The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 197 (1962).** Matters involving the "pattern of training, weaponry and orders" of the armed forces are undoubtedly the type of matters intended to be left to other branches of government, not to be interfered with by an inquisition

from the judicial branch, no matter how specific the allegations of negligence may be. ***Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 2445-46 (1973).**

Pursuant to ***Shearer*** and ***Stephenson***, this Court must find that it is without jurisdiction over plaintiff's suit. ***Selbe v. United States*, 130 F.3d 1265, 1266-68 (7th Cir. 1997).** The Seventh Circuit has stated that the primary consideration is whether plaintiff was on active duty at the time the injury arose. ***Stephenson*, 21 F.3d at 162.** It is uncontested that plaintiff was on active duty during the relevant time period and off-duty when she was allegedly assaulted. Contrary to plaintiff's assertion, her off-duty status is irrelevant because she was on active duty, which "encompasses more than just the time during on-duty hours." ***Miller v. United States*, 643 F.2d 481, 484 n.5 (8th Cir. 1980) (en banc), *citing Hand v. United States*, 260 F.Supp 38, 39-42 (M.D.Ga. 1996); *see Walls v. United States*, 832 F.2d 93 (7th Cir. 1987).** In *Selbe*, the Seventh Circuit barred the claim of a service member who was injured in her barracks while off-duty. ***Selbe*, 130 F.3d at 1266-67** (plaintiff was injured while preparing to go out for the evening); ***see also Feres*, 340 U.S. at 137** (serviceman died in barracks fire). Use of barracks is a benefit conferred upon service members arising solely out [of] their military status and taking advantage of such a perquisite [sic] demonstrates a serviceman was acting "incident to service." ***United States v. Jones*, 112 F.3d 299, 301-02 (7th Cir.), *cert. denied*, 118 S.Ct. 173 (1997); *Miller*, 643 F.2d at 486.** In this case, plaintiff was in the barracks when Robinson's alleged assaults commenced. Because the alleged assaults started on military property in the barracks to which plaintiff was assigned while she was an

active duty member and subject to military discipline, her claim is barred. ***Stephenson*, 21 F.3d at 164.** Further, ***Feres*** applies even when plaintiff was not on the base, because she was on active duty and subject to military discipline. ***Walls v. United States*, 832 F.2d 93, 96 (7th Cir. 1987).** Barring plaintiff's lawsuit here for conduct that occurred off-base would be consonant with another goal of the ***Feres*** doctrine – to protect the distinct federal relationship between the government and the military from the idiosyncrasies of Maryland and New York state law. ***Bielema v. Biester*, 880 F. Supp. 555, 556-57 (N.D. Ill. 1995).**

Moreover, entertaining this suit would necessarily require intrusion into the substance and implementation of the military's disciplinary and supervisory policies. ***Shearer*, 473 U.S. at 690-91.** Plaintiff alleges that other commissioned and non-commissioned officers were aware of Robinson's conduct and failed to report his activities to the proper authorities. Inquiry into this allegation would require the questioning of plaintiff's superior officers and other military personnel. ***Dozler v. United States*, 869 F.2d 1165, 1166 (8th Cir. 1989).** Therefore, the Court must heed the Supreme Court's advice that "[C]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the very heart of the necessary unique structure of the Military Establishment." ***Chappell*, 462 U.S. at 300.** Therefore, the Court lacks subject matter jurisdiction over the matter.

2. Section 2680(h) of the FTCA

Nor can plaintiff establish a negligent supervision claim under the FTCA which bars any claim arising out of an assault or battery. **§ 2680(h).** In her complaint, plaintiff alleges that the government should be held vicariously liable for its negligent supervision of Robinson, which resulted in assault, battery, and the intentional infliction of emotional distress. Specifically, plaintiff alleges that several officers at AIT negligently allowed Robinson to commit numerous sexual assaults upon her over a three month period. According to plaintiff, by permitting Robinson to sexually assault her, the officers breached their duty to protect plaintiff while acting within the scope of their employment. Plaintiff alleges the officers had a duty to protect her because the government assumed responsibility to protect her pursuant to **Paragraph 95 of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. Paragraph 95** sets forth the misprision of serious offense crime which punishes soldiers for concealing knowledge of the actual commission of a felony that would bring discredit upon the armed forces. *Id.* Thus, according to plaintiff, her claim is not barred by **§ 2680(h)** because it sounds in negligence, not assault and battery.

The FTCA grants district courts jurisdiction over claims against the government for money damages for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be

liable to the claimant in accordance with the law of the place where the act or omission occurred. An exception to **§ 1346(b)(1)** is **§ 2680(h)**, which precludes government liability in "any claim arising out of assault [or] battery." ***Id.*** A reading of the plain language of the statute demonstrates that Congress did not limit the statute's applicability to the commission of assaults and batteries. Instead, by using the broad language "arising out of" without any qualifying language, Congress intended **§ 2680(h)** to have an expansive reach to include circumstances where liability would have been incurred vicariously, such as negligent supervision claims. **Section 2680(h)**, therefore, covers situations where the government's liability would have stemmed from its relationship with the tortfeasor and not the commission of the assault or battery itself. As the Fourth Circuit stated "so long as the factual predicate of the claim is one of assault and battery, adroit pleading of negligence or breach of duty on the part of government supervisors will not suffice to circumvent the statutory mandate." ***Thigpen v. United States*, 800 F.2d 393, 396 (4th Cir. 1986).**

The relevant legislative history, although sparse, supports an expansive reading of **§ 2680(h)**. ***Shearer*, 473 U.S. at 55-57 (Burger, C.J., plurality)**. In *Shearer*, a plurality of the Supreme Court stated:

> It is clear that Congress passed the Tort Claims Act on the straightforward assurance that the United States would not be financially responsible for the assaults and batteries of its employees. *See* Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary,

> 76th Cong., 3d Sess., 39 (1940). No one suggested that liability would attach if the Government negligently failed to supervise such an assailant.

473 U.S. at 55. The ***Shearer*** plurality stated that Congress re-confirmed this interpretation when it amended **§ 2680(h)** in 1974, and failed to hint that it thought the government's liability for an assault and battery turned on the adequacy of supervision or warnings. Moreover, the plurality further supported its holding by noting that prior interpretations of parallel provisions of the FTCA held that "arising out of" language included claims based on negligence theories. ***Shearer,* 473 U.S. at 56.** ***See Kosak,* 465 U.S. at 861; *United States v. Neustadt,* 366 U.S. 696, 702 (1961).** The Seventh Circuit interpreted the ***Shearer*** plurality's opinion and the relevant legislative history as indicators that Congress used broader language to prevent plaintiffs from disguising ***respondeat superior*** claims as negligent superior claims. ***Doe v. United States,* 838 F.2d 220, 223 (7th Cir. 1988), *citing Shearer,* 473 U.S. at 55.**

However, the Supreme Court has never held that the FTCA bars all negligent supervision claims. ***United States v. Sheridan,* 487 U.S. 392, 399 (1988), *citing United States v. Muniz,* 374 U.S. 150, 152 (1963).** In ***Sheridan,*** the Supreme Court expressly stated that its holding did not concern the issue of whether a negligent supervision claim "may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee." ***Sheridan,* 487 U.S. at 403, n.8.** In ***Sheridan,*** the Supreme Court adopted the general rule that **§ 2680(h)** should be "construed to apply only to claims that would otherwise be authorized by the basic waiver

of sovereign immunity." ***Id.* at 400.** In reaching its holding, the Supreme Court relied on Judge (later Justice) Harlan's opinion in ***Panella v. United States*, 216 F.2d 622 (2nd Cir. 1954).** Judge Harlan stated that the FTCA "covers actions for personal injuries 'caused by the negligent or wrongful act or omission of *any employee of the Government* while acting within the scope of employment.' " ***Sheridan*, 487 U.S. at 402-03, *quoting Panella*, 216 F.2d at 623.** *Panella*, however, does not address the issue of whether "a claim is barred where the assailant is . . . a government employee." *Doe*, 838 F.2d at 220.

In *Doe*, the Seventh Circuit addressed a similar issue: "whether a claim based solely on the breach of an affirmative duty to the victim, expressly assumed by the government, is barred by section 2680(h) where that breach leads to an assault by a government employee." *Doe*, **838 F.2d 222.** In *Doe*, children were sexually molested by an unknown assailant while in the care of the Scott Air Force Base Day Care Center. ***Id.* at 221.** The plaintiffs argued that the children's injuries arose entirely from the government's alleged negligence and not from the assault. ***Id.* at 221-22.** The Seventh Circuit ruled that the plaintiffs could bring a negligent supervision claim because the government had a "special relationship" with the children to protect them and that their "claim arose when the government allegedly left the children alone, neglecting its voluntarily assumed duty to watch and protect them." ***Id.* at 223.** Specifically, the Seventh Circuit held that "where the government affirmatively assumes a duty to the victim prior to the assault, and the government breaches that duty causing injury to the victim, we cannot say that her claim arises out of the assault." ***Id.* at**

223. Because the government's duty to protect the children arose prior to and independent of the assault, the Seventh Circuit did not bar the claim. *Id.* at 225.

In *Doe*, the Seventh Circuit stressed that its holding was consistent with the FTCA's policy of barring disguised *respondeat superior* claims. *Doe*, 838 F.2d at 224. The FTCA does not bar cases where the government failed to protect the plaintiff, therefore, allegations of negligent supervision of the tortfeasor do not create the requisite factual predicate to satisfy the "arising out of" language of the FTCA. *Id.* To distinguish her claim from a *respondeat superior* claim, plaintiff alleges that the government assumed a duty to protect her prior to and independent of the assault. According to plaintiff, the government had a duty to protect plaintiff by voluntarily adopting a rule prohibiting soldiers from concealing the commission of known serious offenses that would bring discredit upon the armed forces. **Paragraph 95 of Article 134 of the UCMJ.** According to plaintiff, the officers' concealment of Robinson's activity was a breach of the government's duty to protect her.

Permitting plaintiff to recover would be directly contrary to the Congress' intent to "bar claims arising out of a certain type of *factual situation* – deliberate attacks by government employees." ***Miele v. United States*, 800 F.2d 50, 52 (2nd. Cir. 1986)**, *citing* ***Shearer*, 473 U.S. at 55.** In this case, Robinson's alleged predatory behavior can be accurately described as "deliberate attacks." Contrary to plaintiff's allegation that article **134 of the UCMJ** established a pre-existing duty to protect her, no such duty existed. Even if such a duty existed, it arose as a result of Robinson's alleged assault and, therefore, did not exist

independent of and prior to the tortfeasor's conduct. *Doe*, **838 F.2d at 223-24.** Moreover, barring recovery in this case is consonant with Congress' intent to encourage an expansive reading of **§ 2680(h).** As a result, the Court finds that **§ 2680(h)** bars recovery in this case.

CONCLUSION

Accordingly, the Court **GRANTS** defendant's motion to dismiss for lack of subject matter jurisdiction, and plaintiff's case is **DISMISSED** with prejudice. Defendant's appeal from magistrate's order (**Doc. #20**) is **DISMISSED** as moot.

IT IS SO ORDERED.

DATED: 15 December 1998

/s/ William D. Stiehl
DISTRICT JUDGE